No. 94-367

In the Supreme Court of the United States

OCTOBER TERM, 1994

GEORGE W. HEINTZ AND BOWMAN, HEINTZ, BOSCIA & MCPHEE, *Petitioners,*

v.

DARLENE JENKINS, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Amicus will address the following question:

Whether an attorney responsible for the prosecution of litigation should be treated as a debt collector under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692a(6).

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INTEREST OF THE AMICUS CURIAE

Amicus American Bar Association (ABA) is a private, voluntary professional organization of lawyers. *See Public Citizen v. Department of Justice*, 491 U.S. 440, 443-44 (1989). The ABA's mission is to represent the legal profession nationally, serving the public and the profession by promoting justice, professional excellence, and respect for the law. The ABA has developed ethical standards for lawyers that nearly all states have adopted. In 1908, the ABA promulgated the CANONS OF PROFESSIONAL ETHICS; in 1969,

the MODEL CODE OF PROFESSIONAL RESPONSIBILITY; and in 1983, the MODEL RULES OF PROFESSIONAL CONDUCT. These ethical standards address the nature of the attorney's duty of advocacy. The decision below potentially affects this duty to the detriment of both attorney-client relationships and the administration of justice. The ABA Board of Governors resolved on November 8, 1985 to oppose legislation removing the attorney's exemption from the Fair Debt Collection Practices Act. These ABA policies and concerns prompt this brief.[1]

SUMMARY OF ARGUMENT

The Fair Debt Collection Practices Act (FDCPA or Act) regulates "debt collectors." The decision below applied these regulations to an attorney responsible only for the preparation and prosecution of litigation. (By "lawyer" or "attorney," this brief means lawyers responsible only for the preparation and prosecution of litigation, and not lawyers who work as traditional debt collectors making dunning calls and the like.) So interpreted, the FDCPA creates two unfortunate consequences that affect lawyers representing creditors. First, the Act exposes these lawyers to strict personal liability for bringing "any action that cannot legally be taken." Lawyers may violate this FDCPA provision by pursuing claims that are well founded, but that ultimately do not prevail. This risk of strict personal liability will make lawyers reluctant to bring even claims that are meritorious, because meritorious claims sometimes lose. A law that makes lawyers shrink from vigorously representing their clients will damage attorney-client relationships and the administration of justice in this field.

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[1] The parties' letters of consent to the filing of this brief have been filed with the Clerk of the Court pursuant to Rule 37.3 of the Rules of this Court.

Second, the Act exempts "debt collectors" who do not "regularly" collect debts. If applied to lawyers, this provision would exempt less experienced or specialized attorneys from regulation and liability because these lawyers have not "regularly" collected debts. A law that tends to channel clients away from specialized but regulated lawyers toward inexpert but unregulated counsel offends society's interest in seeing the public served by those with experience and ability. It seems unlikely that Congress intended its debt regulation law to have such remote and unwarranted effects.

ARGUMENT

The FDCPA regulates "debt collectors." The decision below applied the FDCPA's regulations to a lawyer engaged solely in litigation. Applying the FDCPA to lawyers who regularly represent creditors can deter zealous advocacy in this field; can impede access to justice; and can reduce the quality of professional service. These mischievous effects can arise in two different ways.

1. By the logic of the interpretation below, the FDCPA would impose personal liability on lawyers if they threaten "to take any action that cannot legally be taken . . . ." 15 U.S.C. section 1692e(5). This quoted language appears to reach creditors' lawyers who sue consumer debtors on claims that in some respect ultimately fail. As the Sixth Circuit stated, "[a]ssuming a lawsuit is brought, and the consumer prevails to any extent, it would appear that the law has been broken, as the creditor threatened to take action that apparently, as a result of the judgment, 'cannot legally be taken.'" *Green v. Hocking*, 9 F.3d 18, 21 (6th Cir. 1993) (quoting FDCPA § 1692e(5)). The lawyer then would face personal liability for the failed action, liability that includes statutory damages and attorneys fees. 15 U.S.C. § 1692k(a)(2)(A) & (3). Thus interpreted, the FDCPA imposes strict personal liability upon lawyers when hindsight shows

that the claims of their clients were less than totally successful.

This FDCPA standard differs markedly from the governing ethical and procedural standard. The relevant standard requires lawyers to be prepared to "further the interests of [their] clients by all lawful means . . . ." *In re Griffiths*, 413 U.S. 717, 724 n.14 (1973); *see* MODEL RULES OF PROFESSIONAL CONDUCT Preamble [2] & Rule 1.3 cmt. 1 (1994). The attorney's overriding ethical duty is to represent clients with zeal, and to be willing to bring any *meritorious* claim for them. The ethical limit on zealous advocacy thus allows all claims that are "not frivolous." *Id.* RULE 3.1; *accord*, FED. R. CIV. P. 11(b)(2) (no Rule 11 liability so long as arguments are "nonfrivolous"); *compare Green*, 9 F.3d at 22 ("[the FDCPA's] system of strict liability . . . conflicts with the current system of judicial regulation [under Rule 11]").

Interpreting the FDCPA to penalize unsuccessful litigation would inhibit properly zealous advocacy. Like everyone else, lawyers prefer to avoid potential personal liability. If the possibility of losing creates the threat of personal liability, lawyers for creditors will hesitate to file claims that might lose, which includes most claims. Few rules of law are certain in all respects. Few factual allegations can be made without risk of rebuttal. This interpretation of the FDCPA thus can deter even meritorious claims. If the FDCPA penalizes litigation failures, then, it will deter even claims for creditors that clearly should win — but might not.

To deter advocacy for creditors is to undermine attorney-client relationships and the administration of justice. Lawyers aware of their own personal exposure will become searchingly skeptical of their clients' cases. Caution will supplant vigor. This skepticism and caution will not escape the notice of clients. It will corrode the trust essential to the

professional relationship. And the FDCPA will do more than simply hammer a wedge between lawyer and client. Ultimately this reading of the FDCPA will hinder access to justice itself. All creditors, including those with meritorious cases, will have a harder time hiring responsible lawyers. When lawyers systematically shrink from vigorously representing creditors and their valid claims, injustice will be the result.

2. The FDCPA's wording threatens to create another harm to the ethical practice of law if courts define "debt collectors" to include lawyers responsible for the preparation and prosecution of litigation. The Act regulates debt collectors only when they "regularly" collect debts, or when their business has the "principal purpose" of debt collection. 15 U.S.C. § 1692a. Occasional debt collectors thus are exempt from the FDCPA. *See* S. REP. NO. 382, 95TH CONG., 1ST SESS. 3 (1977) ("[t]he requirement that debt collection be done 'regularly' would exclude a person who collects a debt for another in an isolated instance"). If applied to lawyers, this provision would tend to discourage creditors from hiring lawyers whose specialization makes them "regular" debt collectors subject to liability under the Act. The exception would make lack of specialized litigation experience into a virtue, because lawyers who have not "regularly" collected debts remain unregulated and cannot incur liability under the Act. Applying the FDCPA to lawyers thus would tend to deprive creditors of the benefits of stable long-term relations with expert attorneys. This unfortunate result would not be in the public interest.

3. In the *Green* opinion, the Sixth Circuit documented other ways in which applying the FDCPA's rules to the normal procedure of litigation "would produce absurd outcomes." 9 F.3d at 21. Inquiring about absurd outcomes is a proper way to construe a statute, despite a contrary suggestion in the decision below. The court below disagreed with the Sixth Circuit's ultimate interpretation of the Act in

Green. But the court below acknowledged that, "[a]s the Sixth Circuit noted, there *are* conceivable problems with regulating attorneys in their debt collection efforts." *Jenkins v. Heintz*, 25 F.3d 536, 539 (7th Cir. 1994) (emphasis added). The Seventh Circuit did not investigate these problems, stating that "our analysis of the statute ends with its language; we do not reach the legislative history." *Id.* (emphasis added). The Sixth Circuit's analysis of absurd outcomes in the *Green* case, however, did not resort to legislative history. Rather, the Sixth Circuit construed the words of the FDCPA itself. This method of statutory construction is conventional and correct. "Surely one of the most frequent justifications courts give for choosing a particular construction is that the alternative interpretation would produce 'absurd' results . . . ." Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 515; *cf. United States v. X-Citement Video, Inc.*, No. 93-723, slip op. 3 (Nov. 29, 1994) (Court will not assume Congress intended absurd results) (citing authorities). It therefore is proper to consider whether a proposed statutory reading will lead to bizarre consequences.

4. It seems improbable that Congress wanted its regulation of debt collectors to subvert any lawyer's role as faithful and active advocate. This Court should doubt that Congress intended to handicap anyone's access to justice, or to prompt creditors to avoid stable relations with expert lawyers.

CONCLUSION

The Court should reverse the judgment of the court of appeals.

Respectfully submitted.

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